APPEAL NO. 92127
MAY 15, 1992

A contested case hearing was held in _____, Texas, on February 26, 1992, with (hearing officer) presiding as hearing officer. The sole disputed issue was whether or not respondent had been certified as having attained maximum medical improvement (MMI) pursuant to the provisions of the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act) and the rules adopted by the Texas Workers' Compensation Commission (Commission). The hearing officer determined that respondent had not been certified by his treating physician as having reached MMI. Appellant contends there is both no evidence and insufficient evidence to support the hearing officer's factual findings and conclusion.

DECISION

We affirm. The evidence is both legally and factually sufficient to sustain the challenged factual findings and legal conclusion of the hearing officer.

At the outset of the hearing, the parties announced five stipulations which included the facts that respondent's injury occurred in the course and scope of his employment and that the employer had received timely notice of the injury. The hearing officer stated that "[g]iven the stipulations that will be made in this case, the burden of establishing that he's entitled to benefits under the [1989 Act] will already [have] been established so for that reason the carrier will be invited to put on [its] evidence first to establish why then if he's entitled to benefits the benefits should not be continued." Appellant voiced no objection to the hearing officer's statement and proposed procedure, proceeded to put on its evidence, and did not contend at the hearing that the hearing officer wrongfully shifted the burden of proof to appellant. Appellant first called respondent for testimony, next took testimony from a witness for the employer, and concluded its case with the introduction, as carrier exhibits, of the medical records of the two physicians who had treated respondent. Respondent (claimant below) called no witnesses and introduced no documents. He was, however, examined by his attorney following his examination by appellant. Appellant assigns as its first appealed issue the error of the hearing officer "in placing the burden upon the carrier to prove that the claimant had not (sic) reached maximum medical improvement." Appellant next challenges findings that certain reports from respondent's two doctors did not constitute findings of MMI.

Respondent testified that he was employed by (Employer), an oilfield equipment and services company, for whom he worked as a truck driver and roustabout, from January 1990 to June 28, 1991. On (date of injury), respondent and a coworker were twisting as hard as they could to take apart a pipe joint when a tool, apparently a wrench, slipped and they both fell to the ground. Respondent testified he fell on his left side and hurt his abdomen. On the day of his injury respondent was seen by Dr. W, who diagnosed an abdominal wall muscle strain and prescribed rest, heat, and a medication. According to Dr. W's records, introduced by appellant, respondent was seen again on June 1st, a Saturday, by Dr. W who

released him for work effective the following Monday. Respondent, however, said he was released to return to work effective June 6th. He was dismissed from employment on June 28, 1991.

Respondent said he applied for unemployment benefits on July 1st and looked for work for a week or so. At some time after his dismissal, probably in August 1991, respondent hauled some hay one day for his father. On that occasion, respondent spent several hours with another person picking up 50 pound bales of hay in a field, loading them on a truck, and then stacking them inside a barn. He has done no other work since his termination by Employer. Respondent said he didn't see Dr. W again after approximately five visits because he had been released to return to work. In September 1991, some two to three weeks after stacking the hay, respondent began to see Dr. K because his side was still hurting and "wasn't completely healed yet." Respondent testified that in January 1992, he still hurt and was treated. He also had "day surgery" in February 1992 for internal bleeding which he believed was related to his injury. No evidence was adduced concerning such surgery.

Mr. A, one of two owners of employer, testified that after respondent was hired in January 1990, he began to develop a record of absenteeism which eventually led to his dismissal in August 1990. After feeling sorry for respondent because he had a wife and six children, respondent was rehired a number of weeks later. However, respondent continued his pattern of absenteeism which eventually led to his dismissal on June 28th.

According to Dr. W's records, after seeing respondent on the injury date and again on June 1st and June 8th, he saw respondent next on June 20th, a Thursday, when respondent complained that he was pushing and straining at work and felt worse. Dr. W prescribed a medication and took respondent off work. At a follow-up visit on Saturday, June 22nd, Dr. W noted that respondent's abdominal pain was much better and released him for work the following Monday. Dr. W's notes of respondent's final visit on June 29th reveal that respondent had very little tenderness in his abdominal wall, was released to work and "released medically." Included in Dr. W's records was an "Initial Medical Report (TWCC-61), dated July 24, 1991, and a "Specific and Subsequent Medical Report" (TWCC-64), dated July 25, 1991. The TWCC-61, though not signed until July 24th, reflected the diagnosis, history, clinical findings, and treatment plan determined at respondent's first visit on (date of injury), the day of his injury. It contained no anticipated date for achieving MMI. The TWCC-64, though not signed until July 25th, reflected and pertained to appellant's first follow-up visit of June 1st, stated respondent could return to work on June 3rd, and further stated that the "anticipated" date respondent would achieve MMI was June 29th. Appellant argued at the hearing that, notwithstanding that the TWCC-64 form was not the TWCC-69 form prescribed by the Commission for the certification of an injured employee's MMI and impairment rating, it nevertheless was a sufficient certification of MMI by Dr. W because he signed it on July 25th after the date of anticipated achievement of MMI and he wasn't required to explicitly certify to the absence of any impairment. Appellant takes issue on appeal with the hearing officer's Finding of Fact No. 5 that Dr. W's report of July 25th on the

TWCC-64 "is not a finding of Maximum Medical Improvement on June 29, 1991."

Dr. K's records reflect that respondent was seen by Dr. K on September 3, 1991, for a consultation and evaluation of back pain and rib pain. Respondent related the history of his (date of injury) injury at work but did not, as he testified, advise Dr. K of his having lifted and stacked the 50 pound hay bales several weeks earlier. Dr. K's assessment in his September 3rd report included "[R]ule out fracture rib versus costochondral junction disruption. . . .[C]ontusion to the rectus abdominis muscle. . . . [m]yofascial pain." Dr. K's treatment plan included anti-inflammatory medication, exercise, and a home pain management program using ice packs and heating pad. Dr. K's records contained three TWCC-64 (Specific and Subsequent Medical Report) forms reflecting respondent's visits of October 17, November 8, and November 25, 1991. The first TWCC-64 stated respondent's "anticipated" dates for achieving MMI, returning to limited type work, and returning to full-time work as "02-03-92." The remaining two TWCC-64s, dated November 11th and November 27th, stated respondent's anticipated date for achieving MMI as "11-30-91" along with anticipated limited work return dates of "12-01-91" and full-time work return dates of "02-03-92." Appellant argued at the hearing that if the hearing officer didn't find Dr. W to have certified to respondent's having achieved MMI, then, in the alternative, he should find that Dr. K had done so based on his last TWCC-64 with the anticipated MMI date of "11-30-91." On appeal, appellant has not taken issue with the hearing officer's Finding of Fact No. 6 that Dr. K's reports on the TWCC-64s are not findings of MMI. Dr. K's records also contained a letter report, dated January 18, 1992, apparently responding to a request for his opinions from appellant or its adjuster, which stated his opinions that while it would not be impossible for a person with the injury respondent received on (date of injury) to later haul hay, it would "be very difficult and uncomfortable to carry on such activity and possibly aggravate the pain," and, that "it is not impossible to sustain similar injuries hauling hay." This report stated that Dr. K "was aware that Dr. W has certified that the patient has reached maximum medical improvement." He went on to say "I certainly agree that this patient has reached maximum medical improvement and should be able to perform some kind of work activity depending on his background and the availability of suitable jobs." This letter stated no bases for Dr. K's assertion on MMI. Appellant urges as error the hearing officer's Finding of Fact No. 7 to the effect that Dr. K's January 18th letter is not a finding of MMI.

Appellant surmised below that Drs. W and K simply erred in completing the TWCC-64 forms instead of the TWCC-69 (Report of Medical Evaluation) forms. Appellant argued that a TWCC-69 is not required in order to have a finding of MMI and that "you can look at the doctor's records and the facts surrounding the situation to determine [MMI];" that carriers should not be penalized for being unable to get doctors to fill out TWCC-69 forms; that Dr. W's records including the TWCC-64 do constitute his certification of MMI; that a real question exists as to whether respondent may have either aggravated his (date of injury) injury or sustained a new injury hauling hay in August and that Dr. K may have been treating respondent for a subsequent injury after Dr. W had certified that respondent had attained MMI for his work-related injury; that in the alternative, Dr. K's letter of January 18th evidenced his certification of MMI on November 30, 1991, at the latest; and, that the failure

of both Drs. W and K to certify to an impairment rating did not invalidate their respective MMI certifications.

In its Request for Review appellant characterized the sole disputed issue as "whether or not [respondent] has reached maximum medical improvement." However, the issue at the hearing was phrased thusly by the hearing officer: "My understanding is that the issue to be heard today is where (sic) the claimant has been certified by his treating physician to have reached maximum medical improvement from his injury which occurred on (date of injury)." (Emphasis supplied.) Attorneys for both parties expressly agreed to that statement of the disputed issue. There is an obvious difference between determining whether respondent has reached MMI, a medical determination, and deciding whether there has been a certification of respondent's having reached MMI consistent with the requirements of the l989 Act and the Commission's rules.

Appellant contends that the hearing officer erroneously shifted the burden of proof from respondent to appellant by concluding that the stipulations of the parties had satisfied respondent's burden to prove he was entitled to compensation under the 1989 Act thus leaving appellant in the position of having to show that respondent was no longer entitled to benefits because he had reached MMI. As we have mentioned, appellant voiced no such complaint below and accepted the hearing officer's statement that since respondent had met his initial burden it was then up to appellant to go forward with the evidence to show respondent had reached MMI. It was appellant, not respondent, who contended at both the BRC which preceded the hearing, and at the hearing itself, that respondent had reached MMI. Article 8308-3.01(a) provides that an insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if the employee is subject to the 1989 Act at the time of the injury and the injury arises out of and in the course and scope of employment. The stipulations of the parties established that respondent was employed by Employer on (date of injury), the date of injury, that Employer was a subscriber to Texas worker's compensation coverage through appellant on (date of injury), and, that respondent's injury occurred in the course and scope of his employment with Employer. We have recognized that a claimant has the burden of proof that a compensable injury was sustained. *See* Texas Workers' Compensation Commission Appeal No. 91013 (Docket No. TY-00005-91-CC-1) decided September 13, 1991. There was no disputed issue concerning whether respondent sustained a compensable injury. Once respondent established he had sustained a compensable injury, as he did through the parties' stipulations, he met his burden of proving his entitlement to whatever benefits he qualified for under the 1989 Act. There was no disputed issue as to whether respondent had "disability" (Article 8308-1.03(16)) and the BRC Report indicated that appellant wanted to stop its payment of temporary income benefits (TIBS) to respondent because respondent had reached MMI. However, the BRO ordered the continued payment of TIBS thus leading to the disputed issue before the contested case hearing.

MMI is defined as the earlier of "the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on

reasonable medical probability" or "the expiration of 104 weeks from the date income benefits begin to accrue." Article 8308-1.03(32). Article 8308-4.26, which addresses impairment income benefits, provides in Section 4.26(d) that "[a]fter the employee has been certified by a doctor as having reached maximum medical improvement, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating . . . . [t]he certifying doctor shall issue a written report to the commission, the employee, and the insurance carrier certifying that maximum medical improvement has been reached, stating the impairment rating, and providing any other information required by the commission. . . . " Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.1 (TWCC Rule 130.1) sets forth in specific detail the definition of "certification" and the requirements for the certification of MMI by a doctor who is required to certify or who determines during the course of treatment whether an employee has reached MMI. TWCC Rule 130.2 provides that a treating doctor shall examine the employee and certify that an employee has reached MMI and assign an impairment rating, if any, as soon as the doctor anticipates no further material recovery from or lasting improvement to the compensable injury based on reasonable medical probability. This rule further requires a treating doctor who certifies that an employee has reached MMI to assign an impairment rating and to complete and forward to the Commission the report required by TWCC Rule 130.1.

We disagree with appellant that the TWCC-64 signed by Dr. W satisfied the requirements for certification of MMI. We observe at the outset that the TWCC-61 form and the TWCC-64 form prepared by Dr. W were an initial medical report and a subsequent medical report required by TWCC Rules 133.100-133.102 which are contained in a subchapter of the TWCC Rules pertaining to required medical reports. TWCC Rule 133.103 relating to "Specific Medical Reports" provides, *inter alia*, that reports of evaluation for permanent medical impairment or for MMI shall be completed in the form and manner prescribed by TWCC Rule 130.1 found in the portion of the TWCC Rules addressing income benefits. Appellant argues that since Dr. W did not sign the TWCC-64 until July 25, 1991, a date following the "6/29/91" date he included in the TWCC-64 as the "anticipated" date for respondent's achieving MMI, "we can anticipate that this is a certification by the doctor that [MMI] was approved as of June 29, 1991." However, the TWCC-64 form simply did not meet the requirements for certification of MMI stated in TWCC Rules 130.1 and 130.2. The TWCC-64 pertained to respondent's first follow-up visit of June 1st and there were four subsequent visits to Dr. W. The form did not contain the narrative history, nor the results of the most recent clinical evaluation, nor the statement that respondent had reached MMI, all of which are required by TWCC Rule 130.1. While TWCC Rule 130.1(c)(7) requires a statement that the employee <u>has</u> reached, "or an estimate of when the employee will reach" MMI. Such an estimated date for MMI corresponds to Item 14 on the Report of Medical Evaluation (TWCC-69) form which requests the doctor to give an estimated date if the doctor has checked "No" to the question "[h]as the employee reached [MMI]." Appellant recognized both below and in its Request for Review that the "Form 69" (TWCC-69) is the form prescribed by the Commission for the certification of MMI.

Before arguing in its appeal that, in the alternative, Dr. K's letter of January 18, 1992,

also constituted a certification of MMI, appellant attempts to interject what it characterizes as a "sub-issue" to MMI to the effect that respondent "clearly sustained a subsequent injury" after Dr. W's June 29th MMI date. As the hearing officer pointed out, however, such was not a disputed issue below. Further it was not a matter included in the hearing officer's findings and conclusions and is not one of the four issues specifically raised by appellant on appeal.

As previously noted, appellant did not state as an appeal issue the hearing officer's finding that the several TWCC-64 forms signed by Dr. K did not constitute findings of MMI. In its "Statement of Issues" within its Request for Review, appellant challenges only the hearing officer's findings concerning Dr. W's TWCC-64 report and Dr. K's letter of January 18, 1992. Parenthetically, we note that while the hearing officer couched his factual findings that none of these documents constituted a "finding" of MMI, his corresponding conclusion of law stated that respondent had not been "certified" as having reached MMI. As we have seen, TWCC Rule 130.1 requires the certification of MMI, in the absence of any presumption that MMI has been reached as provided for in Article 8308-4.23(g) and TWCC Rule 130.4.

Appellant asserts that Dr. K's January 18th letter "clearly states that the claimant has reached [MMI] . . . I do not know how you can get a more blatant statement of certification of [MMI] from a doctor." Dr. K's letter does not contain a narrative history of respondent's medical condition and a description of the most recent clinical evaluation of respondent, all as required by TWCC Rule 130.1(c). The letter also does not contain respondent's social security number nor Dr. K's professional license number and his federal tax identification number required by TWCC Rule 130.1(c), although these data were included in the several TWCC-64 forms signed by Dr. K. Further, TWCC Rule 130.2 provides that a treating doctor shall examine the employee and certify that the employee has reached [MMI] and assign an impairment rating. This rule goes on to provide that a treating doctor who certifies an employee has reached MMI shall assign an impairment rating, complete the report required by TWCC Rule 130.1, and send it to the Commission. None of the TWCC-64 forms evidenced the assignment of an impairment rating nor did Dr. K's letter.

The hearing officer is the sole judge of the relevancy and materiality of the evidence as well its weight and credibility. Article 8308-6.34(e). In reviewing a "no evidence" issue on a challenged finding of the hearing officer, we must consider only the evidence, testimony and reasonable inferences therefrom which support the finding and disregard such as are adverse to the finding. We must uphold the finding if there is any evidence of probative value to support it. In reviewing an "insufficient evidence" issue, we must consider, analyze, and weigh all the evidence and support the challenged finding if there is probative evidence to support it. Highlands Insurance Company v. Youngblood, 820 S.W. 2d 242, 246-247 (Tex. App.-Beaumont, 1992, n.w.h.). In Texas Workers' Compensation Commission Appeal No. 91083 (Docket No. HO-00103-91-CC-1) decided January 6, 1992, one of the contested issues was whether the claimant had reached MMI. The insurance carrier had challenged the hearing officer's finding and conclusion that claimant's doctor had

not certified that claimant had reached MMI with no impairment in accordance with the applicable statutes and regulations. The hearing officer found that the doctor had not used Commission form TWCC-69, had not set forth medical facts or expert opinion which was the basis of his assertion that claimant had reached MMI, and did not make a determination of the existence and degree of impairment based upon the American Medical Association's Guides to the Evaluation of Permanent Impairment, third edition, second printing (Article 8308-4.24). Like Dr. K, the doctor in Appeal No. 91083 had written a letter which stated that the employee had reached MMI on a particular date. Unlike Dr. K's letter, this doctor's letter even went on to say that the employee had no permanent impairment due to his work-related injury. Like Dr. K, the doctor in Appeal No. 91083 was not a designated doctor whose opinion on MMI would be entitled to presumptive weight pursuant to Article 8308-4.25(b). The doctor in Appeal No. 91083 had also written an earlier letter to the employee stating he had no pain, had completed therapy, was neurologically intact, and was able to return to work. The Appeals Panel concluded that the two letters did not meet the requirements for certification of MMI contained in the 1989 Act and the TWCC Rules and that the absence of information in the two letters, in light of the requirements of Article 8308-4.26(d) and TWCC Rule 130.1, sufficiently supported the hearing officer's findings.

Similarly, the absence of information in the TWCC-64 prepared by Dr. W and in the January 18th letter of Dr. K provide probative evidence sufficient to support the findings and conclusion challenged by appellant. *Compare* Texas Workers' Compensation Commission Appeal No. 91125 (Docket No. HO-00159-91-CC-1) decided February 18, 1992. We will not substitute our judgment for that of the hearing officer when, as here, the challenged findings are supported by some evidence of probative value and are not against the great weight and preponderance of the evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W. 2d 865, 868 (Tex. App.-Texarkana, 1989, no writ). The hearing officer's findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951); Pool v. Ford Motor Co., 715 S.W. 2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Robert W. Potts
Appeals Judge